Supreme Court, U.S.
FILED
JUL 20 2000
CLERK

(2)

No.99-2030

INTHE
SUPREME COURT OF THE UNITED STATES

MARK D. GREENBERG, MALCOLM A. SMITH,
and HUGO TORBET,

Petitioners,

v.

THE STATE BAR OF CALIFORNIA and
THE BOARD OF GOVERNORS OF
THE STATE BAR OF CALIFORNIA

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARIE M. MOFFAT, Cal. S.B. No. 62167
LAWRENCE C. YEE, Cal. S.B. No. 84208
DINA E. GOLDMAN, Cal. S.B. No. 142601
Office of the General Counsel
The State Bar of California
180 Howard Street
San Francisco, CA 94105
(415) 538-2000

Counsel for Respondents

21pp

TABLE OF CONTENTS

Page

I. STATEMENT OF THE CASE 1

A. Nature Of The State Bar 1

B. Creation Of The MCLE Program 2

II. ARGUMENT 5

A. The Court Of Appeal Correctly Applied Established Constitutional Law To Find That Petitioners' First Amendment Rights Are Not Violated By The Requirement That They Be Passively Exposed To The Challenged MCLE Courses, Without Being Compelled To Manifest Agreement Or Allegiance To The Subject Matter 5

B. The Court Of Appeal Properly Found That, Even If The Challenged MCLE Requirements Intruded On Petitioners' First Amendment Rights, They Passed Constitutional Scrutiny Because They Are Germane To The State Bar's Permissible Goals of Consumer Protection and Attorney Education 7

III. CONCLUSION 13

TABLE OF AUTHORITIES

Page

Cases

In re Attorney Discipline System, 19 Cal.4th 582,
967 P.2d 49, 79 Cal.Rptr.2d 836 (1998) 1

Board of Education v. Barnette 319 U.S. 624,
63 S.Ct. 1178, 87 L.Ed. 1628 (1943) 6

Board of Regents of the University of Wisconsin
System v. *Southworth*, ___ U.S. ___,
120 S.Ct. 1346, ___ L.Ed.2d ___ (2000) 11

Chaney v. State Bar of California,
386 F.2d 962 (9th Cir. 1967) 6

Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673,
49 L.Ed.2d 547 (1976) 5

Greenberg v. State Bar, 78 Cal.App.4th 39,
92 Cal.Rptr.2d 493 11,12

Hamilton v. Regents, 293 U.S. 245,
55 S.Ct. 197, 79 L.Ed. 343 (1934) 6

Keller v. State Bar of California, 496 U.S. 1,
110 L.Ed.2d 1, 110 S.Ct. 2228 (1990) 1,8,9,10,12

Lathrop v. Donohue, 367 U.S. 820,
81 S.Ct. 1826, 6 L.Ed. 2d 1191 (1961) 8,9

Tennison v. Paulus, 144 F.3d 1285 (9th Cir. 1998) 7

Constitutions

California Constitution
Article VI, Section 9 1

Rules

California Rules of Court
Rule 958 3
Rule 958(c) 3

MCLE Rules and Regulations
Rule 4.1 . . . . . 3, App.1
Rule 4.2 . . . . . 3, App. 1
Rule 5.2 . . . . . 3, App. 3
Rule 5.3 . . . . . 3, App. 3
Rule 5.4 . . . . . 3, App. 4

United States Supreme Court Rules
Rule 24(f) 4

Statutes

California Business and Professions Code
Section 6002 1
Section 6008 1
Section 6008.2 1
Section 6070 2,4
Section 6070, subdivision (a) 2
Section 6070, subdivision (c) 2,3

Respondents the State Bar of California and the Board of Governors of the State Bar of California ("Respondents") respectfully request that this Court deny the petition for writ of certiorari, seeking review of the California Court of Appeal's opinion in this case.

I. STATEMENT OF THE CASE

A. Nature Of The State Bar

Respondent State Bar is a constitutional agency in the judicial branch of state government that acts as the administrative arm of the California Supreme Court in all matters relating to the admission, discipline and reinstatement of attorneys. Cal. Const., art. VI, §9, Cal. Bus. & Prof. Code, §§6008, 6008.2; *In re Attorney Discipline System*, 19 Cal.4th 582, 598-600, 967 P.2d 49, 79 Cal.Rptr.2d 836 (1998). All attorneys licensed to practice law in California must be members of the State Bar. Cal. Const., art. VI, §9; Cal. Bus. & Prof. Code, §6002; *Keller v. State Bar of California*, 496 U.S. 1, 110 L.Ed.2d 1, 110 S.Ct. 2228, 2235 (1990).

B. Creation Of The MCLE Program

In 1989, the California Legislature adopted Business and Professions Code section 6070, initiating a mandatory continuing legal education program for California lawyers. Cal. Bus. & Prof. Code, §6070, subd. (a). The statute required the State Bar of California to request the Supreme Court to adopt a rule of court authorizing the State Bar to establish and administer a mandatory continuing legal education program. Cal. Bus. & Prof. Code, §6070, subd. (a). The legislation further provided that the following categories of attorneys would be exempt from the requirements: retired judges; officers and elected officials of the State of California; full-time professors of law; and full-time employees of the State of California. Cal. Bus. & Prof. Code, §6070, subd. (c).

Pursuant to the legislation, and after statewide public hearings, the State Bar filed a request with the Supreme Court for a new rule of court, authorizing the State Bar to establish a mandatory continuing legal education program. In response, on

December 7, 1990, the California Supreme Court adopted Rule 958. Rule 958 mandated the State Bar to establish and administer a minimum continuing legal education program. The new rule of court incorporated the statutory exemptions provided by section 6070(c) and also set forth an additional category of attorneys who would be exempt from the education requirements -- full-time employees of the United States Government, acting within the scope of their employment. Cal. Rule of Court 958 (c). The new rule of court also provided that the rules adopted by the Board of Governors could provide for exemptions for other categories of attorneys. *Id.*

On December 8, 1990, the State Bar adopted proposed MCLE Regulations to implement the program ordered into effect by the Supreme Court. Under the MCLE Regulations, attorneys may accrue MCLE credit in a variety of ways and at their own pace, including self-study, so long as the total number of credits are earned by the end of the compliance period. MCLE Regulations, §§4.1, 4.2, 5.2, 5.3, 5.4. Pursuant

to United States Supreme Court Rule 24(f), the text of these regulations appears in the appendix to this Opposition.

Business and Professions Code section 6070 was amended, effective January 1, 2000 to reduce the original requirement of 36 hours of continuing education every 36 months to 25 hours every 36 months. As amended, section 6070 also reduces the requirement of 8 hours in legal ethics or law practice management (at least 4 hours of which had to be in legal ethics) to a total of 4 hours in legal ethics only, and deletes the categorical exemption from the MCLE requirement for retired judges. Conforming amendments to the California Rule of Court and the MCLE Regulations are pending.

II. ARGUMENT

A. The Court Of Appeal Correctly Applied Established Constitutional Law To Find That Petitioners' First Amendment Rights Are Not Violated By The Requirement That They Be Passively Exposed To The Challenged MCLE Courses, Without Being Compelled To Manifest Agreement Or Allegiance To The Subject Matter.

The Court of Appeal correctly found that the MCLE requirements challenged by Petitioners do not present a sufficiently substantial intrusion to constitute a First Amendment violation. *See Elrod v. Burns*, 427 U.S. 347, 362, 96 S.Ct. 2673, 2684, 49 L.Ed.2d 547 (1976) [before applying balancing test to determine if First Amendment infringement is justified by compelling state interests, there must be infringement that involves "significant impairment" of First Amendment rights.] As the Court of Appeal held, a requirement that Petitioners take two hours of instruction over a period of three years either in live classes, self study or by speaking in an approved education course is not a substantial enough intrusion to warrant constitutional scrutiny.

Further, the Court of Appeal cited cases holding that required study in subjects, even those which unquestionably contain ideological content, does not implicate First Amendment rights, where a person is only required to be passively exposed to subject matter, without being compelled to manifest any agreement or allegiance to a particular message. *See Hamilton v. Regents*, 293 U.S. 245, 262-265, 55 S.Ct. 197, 79 L.Ed. 343 (1934) [required training courses in military science and tactics did not violate First Amendment rights of conscientious objectors to violence]; *Board of Education v. Barnette* 319 U.S. 624, 631-632, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) [students may not be required to salute the American flag with a Hitler-style, stiff-arm salute, but they may be required to attend civics classes relating to political subjects, including the symbolism of the flag]; *Chaney v. State Bar of California*, 386 F.2d 962, 964 (9th Cir. 1967) [applicants to be California lawyers may constitutionally be required to demonstrate familiarity with certain legal concepts,

including essay questions on "legal philosophy," even though they might not be required to manifest allegiance to any particular legal philosophy]; *Tennison v. Paulus*, 144 F.3d 1285, 1287 (9th Cir. 1998) [no First Amendment violation to require students to attend classes in fashionable subjects, despite claims that this interfered with certain students' "freedom of mind"]. Petitioners' attempts to distinguish this controlling authority were properly rejected by the Court of Appeal and do not justify review by this Court.

B. The Court Of Appeal Properly Found That, Even If The Challenged MCLE Requirements Intruded On Petitioners' First Amendment Rights, They Passed Constitutional Scrutiny Because They Are Germane To The State Bar's Permissible Goals of Consumer Protection and Attorney Education.

The Court of Appeal correctly held that even if the challenged MCLE requirements are found to infringe upon Petitioners' First Amendment rights, they nevertheless pass constitutional scrutiny because they advance the State Bar's interests in regulating the legal profession and improving the

quality of legal services in California. Petitioners have conceded throughout this litigation that their constitutional challenge is governed by the test articulated by this Court in *Keller v. State Bar of California*, 496 U.S. 1, 110 S.Ct. 2228 (1990) ("*Keller*") but disagree with the Court of Appeal's conclusion that the challenged MCLE requirements are germane under *Keller*. However, the challenged activities clearly pass muster under *Keller* and related cases.

In *Lathrop v. Donohue*, 367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed. 2d 1191 (1961) ("*Lathrop*"), the United States Supreme Court rejected a Wisconsin lawyer's challenge to the state's requirement mandating membership in the Wisconsin bar and compelling payment of dues as violative of his First and Fourteenth Amendment rights to freedom of association. The Supreme Court held that an integrated bar served "the State's legitimate interests in raising the quality of professional services" and that these costs should be shared by all lawyers, even though the bar may also engage in some legislative

activity with which the plaintiff attorney disagreed. *Lathrop*, *supra*, 81 S.Ct, 1838-1839. The Supreme Court noted with seeming approval that among the activities of the Wisconsin Bar justifying integration were "those [activities] directed towards postgraduate education of lawyers." *Lathrop*, *supra*, 81 S.Ct. at 1835-1836.

However, the *Lathrop* court reserved judgment on the question of whether compulsory bar membership and dues violated plaintiff's First Amendment rights when the bar engaged in political or ideological activities. *Lathrop*, *supra*, 81 S.Ct. at 1826-1827, 1838-1840. That question was later reached in *Keller v. State Bar of California*, *supra*, 110 S.Ct. 2228. In *Keller*, this Court reaffirmed its decision in *Lathrop* upholding the constitutionality of the integrated bar, but went on to hold that the State Bar is subject to the same First Amendment principles applied in cases involving use of compulsory dues by unions to fund political or ideological activity. *Keller*, *supra*, 110 S.Ct. at p. 2235. Accordingly, the

court held that the State Bar may constitutionally spend its membership fees on those activities that are necessarily or reasonably related to its purposes of regulating the legal profession or improving the quality of legal services available to the people of the State. *Keller*, *supra*, 110 S.Ct. at 2236. These activities are considered germane and are chargeable to all members, even if they have political or ideological coloration. On the other hand, the State Bar may not use the fees of members who object to paying for activities that have political or ideological coloration and are not reasonably related to the bar's germane purposes, i.e., regulating the profession or improving the quality of legal services. *Keller*, *supra*, 110 S.Ct. at 2233-2234, 2236.

The Court of Appeal correctly found that the challenged MCLE courses were clearly germane under *Keller*, stating as follows:

> The prevention of substance abuse and emotional illness among lawyers would, if accomplished, constitute a worthy endeavor,

> which could spare the client from the obvious harms attendant on substance abuse or emotional illness among lawyers representing the public. Further, the elimination of bias in representation and decision making, where improperly based on irrelevant personal characteristics, has long been a goal of the legal profession, and is germane and rationally related to the special nature of law practice and the consumer protection goals of the MCLE program. *See Warden, supra*, 21 Cal.4th at pp. 634-651, 88 Cal.Rptr.2d 283, 982 P.2d 154; *Thiel v. State Bar of Wisconsin* (7th Cir. 1996) 94 F.3d 399, 405 [finding no First Amendment violation from a number of mandatory State Bar programs, including a program to assist lawyers suffering from substance abuse, and prevent its recurrence.]

Greenberg v. State Bar, 78 Cal.App.4th 39, 92 Cal.Rptr.2d 493, 496.

Citing circuit court decisions preceding this Court's decision in *Keller*, and the Seventh Circuit's decision in *Southworth* v. *Grebe*, which has since been superceded by this Court's decision in *Board of Regents of the University of Wisconsin System* v. *Southworth*, ___ U.S. ___, 120 S.Ct. 1346, ___ L.Ed.2d ___ (2000), Petitioners go on to assert that, even if the Court of Appeal was correct in finding that the

challenged MCLE classes were germane under *Keller*, the court erred in failing to apply an additional test to see if the classes were narrowly tailored to advance the interests found to be germane. Petitioners fail to understand that *Keller* does not require this additional scrutiny where it is found, as the Court of Appeal found here, that a challenged activity is germane to the State Bar's permissible goals. *Keller*, 496 U.S. at 8. Moreover, Petitioners do not convincingly argue that the challenged educational requirements are not narrowly tailored. As explained above, Petitioners object to a requirement of two hours of education over a 30 month period, which can be satisfied in a variety of ways including self-study or time spent teaching the required subjects. By arguing that, in order to be narrowly tailored, the classes should only be required of attorneys who have been disciplined, Petitioners ignore the holding of the Court of Appeal that education aimed at prevention of harm to clients is germane because it is related to regulation of the legal profession and protection of consumers

of legal services. *Greenberg v. State Bar*, *supra*, 78 Cal.App.4th 39, 92 Cal.Rptr.2d 493, 496.

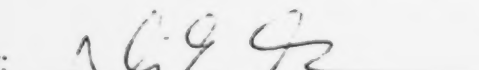
III. CONCLUSION

This case presents no important unsettled federal question warranting review by this Court. Rather, the issues raised were properly decided by the Court of Appeal based on this Court's analysis in *Keller*. Accordingly, for this and all the reasons stated above, the petition for writ of certiorari should be denied.

Dated: July 20, 2000

Respectfully submitted,

MARIE M. MOFFAT
LAWRENCE C. YEE
DINA E. GOLDMAN

By: 
Dina E. Goldman

Attorneys for Respondents,
The State Bar of California,
The Board of Governors of
The State Bar of California

MCLERULESANDREGULATIONS
(adopted by State Bar of California Board of Governors 12/8/90; last revised effective 9/1/97)

4.0 CATEGORIES OF CREDIT

4.1 PARTICIPATORY CREDIT

Participatory credit may be claimed for:

4.1.1 Attending approved education activities, including lectures, panel discussions, question-and-answer periods, or in-house education;

4.1.2 Viewing videotapes or film instruction, listening to audiotapes, or viewing or participating in other audiovisual activities including interactive video instruction and activities electronically transmitted from another location. The viewing, listening, or participating must be approved, and must be verified by the provider (for purposes of this section, sponsorship requires the approved provider to ensure compliance with sections 7.1 and 7.2);

4.1.3 Speaking in approved education activities;

4.1.4 Attending a law school class after the member's admission to practice in California, provided the member officially registers for the class and satisfactorily completes the class (by audit or grade), as required by the law school; or

4.1.5 Teaching a class at a law school.

4.2 SELF-STUDY CREDIT

Up to but not more than 18 hours of self-study credit, or in the case of a proportional requirement, up to but not more than one-half of the required hours, may be claimed per compliance period for:

4.2.1 Viewing approved videotapes or videotapes of approved activities or viewing or participating in other approved audiovisual activities, including interactive video instruction and activities electronically transmitted from another location;

4.2.2 Listening to approved audiotapes or audiotapes of approved activities;

4.2.3 Preparing, as an author or co-author, written materials published or accepted for publication, e.g., in the form of an article, chapter, or book, which contribute to the legal education of the author member (which were not prepared in the ordinary course of the member's practice or employment or to accompany speaking in an approved education activity); or

4.2.4 Participating in self-assessment testing (open-book tests that are completed by the member, submitted to the provider, graded, and returned to the member with the correct answers and an explanation of why the answer chosen by the provider is the correct answer).

5.0 COMPUTATION OF CREDIT HOURS

5.2 CREDIT FOR SELF-ASSESSMENT TESTS

For self-assessment tests, providers must specify the maximum credit allowable. Credit may be offered only for the time actually spent answering the self-assessment test questions and reviewing the results from the provider.

5.3 CREDIT FOR SPEAKERS

5.3.1 Credit hours for speaking in an approved education activity are computed by multiplying actual speaking time by four. For repeat presentations, speakers may claim only actual speaking time. Each presentation of a workshop or skills training activity (an education activity that includes the active participation of attendees in the form of interactive exercises, simulations, and demonstrations and therefore must be modified for the attendees at each presentation) will count as a separate education activity.

5.3.2 Credit hours for panelists at an approved education activity are computed by multiplying the length of time the panelist is assigned to speak by four. If specific speaking times are not assigned to the panelists, "the length of time the panelist is assigned to speak" means the actual length of the education activity divided by the number of panelists. For the remainder of the panel and for repeat presentations, panelists may claim only actual attendance time.
For example, a two-hour panel with four panelists who are not assigned specific speaking times would be calculated as follows:

1. To determine each panelist's speaking time, divide the length of the panel by the number of panelists (in this case, 2 hrs x 60 min/hr = 120 mins divided by 4 panelists = 30 mins or .5 hrs of speaking time).

2. Multiply the panelist's speaking time x 4 (.5x4 = 2 hrs).

3. For the remainder of the panel (1.5 hrs), credit the panelist with actual attendance time only. Do NOT count the panelist's speaking time twice, i.e., as part of the attendance time.

4. Each panelist should receive 3.5 hrs (2 hrs of speaking credit plus 1.5 hrs of attendance).

5.3.3 A moderator who either introduces other speakers or performs in an administrative capacity and does not present material having significant current intellectual or practical content for members may claim the same credit hours as attendees.

5.4 CREDIT FOR TEACHING A LAW SCHOOL CLASS

5.4.1 Credit hours for teaching a law school class are computed by multiplying the number of credit hours/units granted by the law school by 12. If a portion of a law school class is devoted to a subject set forth in section 2.1, credit hours for teaching that subject are computed by multiplying actual speaking time by one. In no case may the credit hours claimed for teaching a law school class exceed credit hours/units multiplied by 12.

5.4.2 Credit hours for a guest lecturer or substitute teacher in a law school class are computed by multiplying actual speaking time by four. For repeat presentations, credit may be claimed only for actual speaking time.